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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

CURTIS STATEN, JR. et al.,

Defendants and Appellants.

B297663

(Los Angeles County
Super. Ct. No. TA080513)

APPEAL from postjudgment orders of the Superior Court of the Superior Court of Los Angeles County, John J. Lonergan, Jr., Judge. Affirmed.

Maxine Weksler, under appointment by the Court of Appeal, for Defendant and Appellant Curtis Staten, Jr.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant Kevin Jefferson.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Amanda V.

Lopez and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

Curtis Staten and Kevin Jefferson, convicted at a joint trial of first degree murder and attempted willful, deliberate and premeditated murder following a gang-related drive-by shooting (see *People v. Jefferson* (2008) 158 Cal.App.4th 830 (*Jefferson*)), appeal from postjudgment orders denying their petitions for resentencing under Penal Code section 1170.95,¹ based on the superior court's findings, made without appointment of counsel or an evidentiary hearing, that they had failed to make a prima facie showing of their eligibility for relief and the superior court's ruling, in the alternative, that section 1170.95 is unconstitutional. In *People v. Verdugo* (2020) 44 Cal.App.5th 320, review granted March 18, 2020, S260493 (*Verdugo*), we rejected Staten and Jefferson's argument regarding the procedures the superior court must follow once a section 1170.95 petition has been filed.² Because Staten and Jefferson have

¹ Statutory references are to this code.

² The Supreme Court in *Verdugo* ordered briefing deferred pending its decision in *People v. Lewis*, S260598, in which the issues to be briefed and argued are limited to "(1) May superior courts consider the record of conviction in determining whether a defendant has made a prima facie showing of eligibility for relief under Penal Code section 1170.95? (2) When does the right to appointed counsel arise under Penal Code section 1170.95, subdivision (c)?"

advanced no persuasive reason for us to reconsider that decision, we affirm.³

FACTUAL AND PROCEDURAL BACKGROUND

1. The Commitment Offenses, Trial and Appeal

The evidence at Staten and Jefferson’s joint trial established a white Chevrolet Suburban stopped late at night next to the parked automobile in which Anthony Staniforth and Dalinda Penaloza sat, talking to each other about their future. The passenger in the Suburban’s front seat bent over, came up with a handgun and began shooting. Staniforth was killed; Penaloza was hit with broken glass. (*Jefferson, supra*, 158 Cal.App.4th at pp. 833-834.)

During an investigation that initially focused on locating the SUV, the police impounded Staten’s white Suburban, which had a broken tinted window and matched Penaloza’s description of the shooter’s vehicle. Three fired bullet casings were found inside the SUV, and a gun expert matched those casings with a casing from the murder scene: “The same gun had fired all four.” (*Jefferson, supra*, 158 Cal.App.4th at p. 834.) Although Staniforth was not a gang member, it was believed the shooting was in retaliation for the murder the day before of a member of

³ The Attorney General agrees with Staten and Jefferson that section 1170.95 is constitutional, and several well-reasoned court of appeal decisions have rejected the superior court’s constitutional analysis (e.g., *People v. Bucio* (Apr. 27, 2020, B299688); *People v. Solis* (2020) 46 Cal.App.5th 762; *People v. Lamoureux* (2019) 42 Cal.App.5th 241). However, because we affirm the orders denying Staten’s and Jefferson’s petitions based on the superior court’s findings regarding their failure to make a prima facie showing of eligibility for resentencing, we need not address that issue.

the Compton Fruit Town Piru street gang, which his fellow gang members blamed on the Varrio Tortilla Flats, a rival Compton gang. (*Id.* at p. 833.)⁴ Jefferson was a member of Fruit Town Piru; Staten belonged to a different gang, but the two men knew each other because Jefferson was dating Staten's cousin and, according to Jefferson, "Staten and his family had been living in the neighborhood for ages." (*Id.* at p. 835.)

Following the arrest of Staten and Jefferson, the police put the two men in a cell with a hidden microphone. As hoped, "Staten and Jefferson started talking about the shooting. Both made incriminating statements. Many comments revealed their damning knowledge of the crime's details. At their joint trial, the jury heard their taped conversation." (*Jefferson, supra*, 158 Cal.App.4th at p. 835.) Although an initial trial resulted in a hung jury, at the second trial both men were convicted of first degree murder and attempted willful, deliberate and premeditated murder with true findings the offenses had been committed for the benefit of a criminal street gang and a principal in the offenses had personally and intentionally discharged a firearm causing death. The jury found not true the allegation Jefferson had personally discharged a firearm causing death. Jefferson was sentenced to an aggregate indeterminate state prison term of 76 years to life; Staten to an aggregate indeterminate state prison term of 75 years to life. (*Id.* at p. 839.)

On appeal we rejected Staten and Jefferson's arguments it was error to admit the tape of their jail cell conversations into

⁴ Staniforth, who was wearing short sleeves when he was shot, had tattoos on his arms, one of which could have been mistaken for a "V.F." gang tattoo. (*Jefferson, supra*, 158 Cal.App.4th at p. 834.)

evidence. (*Jefferson, supra*, 158 Cal.App.4th at pp. 839-845.) In the nonpublished portion of our opinion, we also rejected their argument the court's instructions violated their right to due process by permitting the jury to convict them of first degree murder without finding express malice. (See *People v. Jefferson* (Jan. 7, 2008, B192952), pp. 16-18.) We explained, "The court instructed about first degree murder on two theories. The first was based on a willful, deliberate, and premeditated killing. (CALJIC No. 8.20.) This instruction was that, to find first degree murder, the jurors had to find 'express malice aforethought.' 'Express malice' and 'an intent to kill' are functional equivalents. (*People v. Moon* (2005) 37 Cal.4th 1, 29.) The second theory of first degree murder was 'drive-by murder.' (CALJIC No. 8.25.1.) The drive-by murder instruction required the jury to find the 'defendant specifically intended to kill a human being.' Both first degree murder theories thus required an express intent to kill."

These instructions, we held, adequately required express malice and an intent to kill as conditions of first degree murder. But, we continued, even if there had been error, it would have been harmless beyond a reasonable doubt. "There was no doubt this murder was intentional, deliberate, and premeditated. The motive was retaliation. Staten and Jefferson went on a hunt for someone to kill. They headed for rival gang territory. They found a target. Staten stopped the Suburban and backed up to get closer. No one spoke before shooting. There was no provocation or heat of passion. Two shooters fired many bullets at close range. Staten and Jefferson set out to take a life for a life. They accomplished their mission. On these facts, debate about express intent to kill instructions is academic." (*People v. Jefferson, supra*, B192952, p. 18.)

2. The Petitions for Resentencing

In his petition for resentencing, filed January 22, 2019 on a downloadable form created by Re:Store Justice (see *Verdugo*, *supra*, 44 Cal.App.5th at p. 324 & fn. 2), Staten declared by checking boxes that he had been convicted of first or second degree murder pursuant to the felony murder rule or the natural and probable consequences doctrine and could not now be convicted of murder because of amendments to sections 188 and 189, effective January 1, 2019. In a section of the form petition applicable only to petitioners who had been convicted under the felony murder rule, Staten checked the box stating he was not the actual killer. Staten requested the court appoint him counsel during the resentencing process.

In his petition, also filed January 22, 2019 on the Re:Store Justice form, Jefferson checked boxes declaring he had been convicted of first or second degree murder pursuant to the felony murder rule or the natural and probable consequences doctrine and could not now be convicted of murder because of amendments to sections 188 and 189, effective January 1, 2019. He also checked boxes stating he had been convicted of first degree felony murder and could not now be convicted under that theory because he was not the actual killer, did not assist the actual killer with the intent to kill and was not a major participant in the underlying felony. In addition, Jefferson checked the box stating there had been a prior determination by a court or jury that he was not a major participant and had not acted with reckless indifference to human life when participating in the underlying felony leading to his conviction under the felony murder rule. Jefferson also requested appointment of counsel.

3. *The Superior Court's Rulings*

The superior court denied Staten's and Jefferson's petitions for resentencing on March 25, 2019,⁵ ruling, as a matter of law, neither Staten nor Jefferson was entitled to relief. Summarizing our description of the circumstances of Staniforth's murder and our opinion's analysis of Staten and Jefferson's argument regarding the trial court's murder instructions, the court stated the two men had acted with express malice in aiding and abetting the shooter and had not been convicted of murder under either the felony murder rule or the natural and probable consequences doctrine. Alternatively, the court ruled, Senate Bill No. 1437 (2017-2018 Reg. Sess.) (Stats. 2018, ch. 1015) (Senate Bill 1437) impermissibly amended two California initiatives, Proposition 47 and Proposition 115, and violated article I, sections 28(A)(6) and 29 of the California Constitution, and section 1170.95, as adopted by Senate Bill 1437, violated the separation of powers doctrine established by the California Constitution.

Staten and Jefferson were not present in court when the court ruled. Counsel had not been appointed for them.

DISCUSSION

1. *Senate Bill 1437 and the Right To Petition To Vacate Certain Prior Convictions for Murder*

Senate Bill 1437, effective January 1, 2019, amended the felony murder rule and eliminated the natural and probable

⁵ Section 1170.95, subdivision (a), provides the petition for resentencing is to be filed "with the court that sentenced the petitioner." Gary E. Daigh, who presided at Staten and Jefferson's trial (see *Jefferson, supra*, 158 Cal.App.4th at p. 830), retired in 2012. Judge John J. Loneragan, Jr. ruled on Staten's and Jefferson's petitions.

consequences doctrine as it relates to murder through amendments to sections 188 and 189. New section 188, subdivision (a)(3), provides, “Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.”

New section 189, subdivision (e), in turn, provides with respect to a participant in the perpetration or attempted perpetration of a felony listed in section 189, subdivision (a), in which a death occurs—that is, as to those crimes that provide the basis for the charge of first degree felony murder—that the individual is liable for murder “only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.”

Senate Bill 1437 also permits, through new section 1170.95, an individual convicted of felony murder or murder under a natural and probable consequences theory to petition the sentencing court to vacate the conviction and be resentenced on any remaining counts if he or she could not have been convicted of murder because of Senate Bill 1437’s changes to the definition of the crime. Section 1170.95, subdivision (c), requires the sentencing court to review the petition; determine if it makes a prima facie showing the petitioner falls within the provisions of

section 1170.95; and, if the petitioner has requested counsel, to appoint counsel to represent the petitioner. After counsel has been appointed, the prosecutor is to file and serve a response to the petition; and the petitioner may file a reply. If at this point the court finds the petitioner has made a prima facie showing he or she is entitled to relief, the court must issue an order to show cause (§ 1170.95, subd. (c)) and conduct a hearing to determine whether to vacate the murder conviction and resentence the petitioner on any remaining counts (§ 1170.95, subd. (d)(1)).⁶

2. The Superior Court Properly Denied Staten's and Jefferson's Resentencing Petitions on the Ground They Are Ineligible as a Matter of Law for Any Relief Under Section 1170.95

As our 2008 opinion affirming the trial court judgments made clear, Staten's and Jefferson's first degree murder convictions were not based on the felony murder rule or the natural and probable consequences doctrine; and the jury necessarily found the two men had acted with express malice when they participated in the drive-by shooting of Staniforth and Penaloza. Nonetheless, because they checked boxes on a preprinted form making the counterfactual declaration their convictions had been based on either or both of those theories and they could not now be convicted of murder under the amended versions of section 188 and 189, Staten and Jefferson contend they were entitled to appointment of counsel and an evidentiary hearing as a matter of statutory interpretation and constitutional

⁶ Once an evidentiary hearing has been ordered, the People may present new and additional evidence to demonstrate the petitioner is not entitled to resentencing. The petitioner also may present new or additional evidence in support of the resentencing request. (§ 1170.95, subd. (d)(3).)

right before the court determined they were ineligible for resentencing under section 1170.95. Neither argument has merit.

a. *Staten and Jefferson's statutory arguments were rejected in Verdugo*

In *Verdugo, supra*, 44 Cal.App.5th 320 this court held, after receiving a facially sufficient petition but before appointing counsel for the petitioner, the superior court may examine the readily available portions of the record of conviction, including any appellate opinion affirming the conviction, to determine whether the petitioner has made a prima facie showing that he or she could not be convicted of first or second degree murder following the changes made to sections 188 and 189 and thus falls within the provisions of section 1170.95. (*Verdugo*, at pp. 329-330, 332.) If the petitioner's ineligibility for resentencing is established as a matter of law by the petition itself and the record of conviction, the petition may be summarily denied. If not, the court must direct the prosecutor to file a response to the petition, permit the petitioner (through appointed counsel, if requested) to file a reply and then determine, with the benefit of the parties' briefing and analysis, whether the petitioner has made a prima facie showing he or she is entitled to relief requiring issuance of an order to show cause and an evidentiary hearing. (*Verdugo*, at p. 330.)⁷

⁷ We explained, "The first sentence of section 1170.95, subdivision (c), directs the court to review the petition and determine if the petitioner has made the requisite prima facie showing. The second sentence provides, if the petitioner has requested counsel, the court must appoint counsel to represent him or her. The third sentence requires the prosecutor to file and

Here, as discussed, Staten’s and Jefferson’s ineligibility for resentencing under section 1170.95 was established as a matter of law by our opinion affirming their convictions for first degree murder and attempted premeditated murder. They were not entitled under section 1170.95 to appointment of counsel or an evidentiary hearing before the court denied their petitions.

b. *Staten and Jefferson’s constitutional argument lacks merit*

Asserting the determination whether a petitioner has made a prima facie showing he or she falls within the provisions of section 1170.95 is a “critical stage” of a criminal proceeding, Staten and Jefferson contend the superior court’s summary denial of their petitions violated their constitutional right to the assistance of counsel. (See generally *Marshall v. Rodgers* (2013) 569 U.S. 58, 92 “[i]t is beyond dispute that ‘[t]he Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process’”; *People v. Doolin* (2009) 45 Cal.4th 390, 453 [sentencing is a critical stage in the criminal process within the meaning of the Sixth Amendment].)

serve a response to the petition within 60 days of service of the petition and permits the petitioner to file a reply to the response. The structure and grammar of this subdivision indicate the Legislature intended to create a chronological sequence: first, a prima facie showing; thereafter, appointment of counsel for petitioner; then, briefing by the parties.” (*Verdugo, supra*, 44 Cal.App.5th at p. 332; accord, *People v. Cornelius* (2020) 44 Cal.App.5th 54, 58 [section 1170.95 does not mandate appointment of counsel where the petitioner “is indisputably ineligible for relief”], review granted Mar. 18, 2020, S260410.)

However, as the Supreme Court explained in *People v. Shipman* (1965) 62 Cal.2d 226, 232, “Unless we make the filing of adequately detailed factual allegations stating a prima facie case a condition to appointing counsel, there would be no alternative but to require the state to appoint counsel for every prisoner who asserts that there may be some possible ground for challenging his conviction. Neither the United States Constitution nor the California Constitution compels that alternative.” Accordingly, in general, in postconviction proceedings, “in the absence of adequate factual allegations stating a prima facie case, counsel need not be appointed” to represent a petitioner in the trial court. (*Ibid.*; accord, *In re Clark* (1993) 5 Cal.4th 750, 780 [“the appointment of counsel is demanded by due process concerns” if a postconviction “petition attacking the validity of a judgment states a prima facie case leading to issuance of an order to show cause”]; see *People v. Rouse* (2016) 245 Cal.App.4th 292, 298 (*Rouse*) [“The United States Supreme Court has declined to extend the Sixth Amendment right to counsel to postconviction proceedings. [Citation.] Federal courts have consistently ruled that an incarcerated defendant has no constitutional right to counsel with respect to statutory postconviction motions seeking a reduction in sentence”]; see also Cal. Rules of Court, rule 4.551(c)(1), (2) [following the filing of a petition for writ of habeas corpus, the superior court must issue an order to show cause if the petitioner has made a prima facie showing that he or she is entitled relief; “[o]n issuing an order to show cause, the court must appoint counsel for any unrepresented petitioner who desires but cannot afford counsel”].)

Staten’s reliance on *Rouse*, *supra*, 245 Cal.App.4th 292, a case involving a petition for resentencing under section 1170.18,

subdivision (a) (Proposition 47), is misplaced. In *Rouse* our colleagues in Division Eight of this court distinguished published decisions that had concluded there was no right to counsel at the initial eligibility stage of a petition under section 1170.18 (*Rouse*, at p. 299) and held, once the superior court had determined the Proposition 47 petition was meritorious and the petitioner entitled to be resentenced, the resentencing hearing “is akin to a plenary sentencing hearing” and properly characterized as a “critical stage” in the criminal process to which the right to counsel attaches. (*Rouse*, at pp. 299-300.)

People v. Fryhaat (2019) 35 Cal.App.5th 969, also relied upon by Stanton and Jefferson, is similar to *Rouse* and likewise provides no support for their argument they had a constitutional right to appointment of counsel simply upon the filing of a section 1170.95 petition with the proper boxes checked. *Fryhaat* involved section 1473.7, which permits an individual no longer in custody to move to vacate his or her conviction or sentence based on a lack of understanding of the immigration consequences of a guilty plea.⁸ After construing the statutory language to require a

⁸ Section 1473.7, subdivision (a), provides, “A person who is no longer in criminal custody may file a motion to vacate a conviction or sentence for either of the following reasons: [¶] (1) The conviction or sentence is legally invalid due to prejudicial error damaging the moving party’s ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere. A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel. [¶] (2) Newly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice.”

hearing and, arguably, appointment of counsel for an indigent moving party,⁹ in order to avoid a constitutional question the court of appeal held, “In light of the fact writs of habeas corpus and writs of *coram nobis*, and likely section 1016.5 motions to vacate, require court-appointed counsel for an indigent petitioner or moving party who has established a prima facie case for entitlement to relief, and given a section 1473.7 motion was intended to fill the gap left by the foregoing procedural avenues for relief, interpreting section 1473.7 to also provide for court-appointed counsel where an indigent moving party has adequately set forth factual allegations stating a prima facie case for entitlement to relief would best effectuate the legislative intent in enacting section 1473.7.” (*Fryhaat*, at p. 983, fn. omitted.)

⁹ Former section 1473.7, subdivision (d), in effect at the time the superior court ruled on Fryhaat’s motion, provided, “All motions shall be entitled to a hearing. At the request of the moving party, the court may hold the hearing without the personal presence of the moving party if counsel for the moving party is present and the court finds good cause as to why the moving party cannot be present.” (Stats. 2016, ch. 739, § 1.) By the time of the court of appeal’s decision in *Fryhaat*, section 1473.7, subdivision (d), had been amended, effective January 1, 2019, to provide, “All motions shall be entitled to a hearing. Upon the request of the moving party, the court may hold the hearing without the personal presence of the moving party provided that it finds good cause as to why the moving party cannot be present. If the prosecution has no objection to the motion, the court may grant the motion to vacate the conviction or sentence without a hearing.” (Stats. 2018, ch. 825, § 2.)

The scheme embraced as a matter of due process in *Rouse* and adopted to avoid a constitutional issue in *Fryhaat* is precisely the model created by section 1170.95. At the initial eligibility stage, there is no right to appointed counsel. However, once the court concludes it cannot determine the petitioner's ineligibility for relief as a matter of law, counsel must be appointed for those petitioners who have requested it. (§ 1170.95, subd. (c).) Because the superior court properly ruled Staten and Jefferson were ineligible for relief under section 1170.95 as a matter of law, they were not entitled to appointment of counsel as a matter of statutory or constitutional right.

DISPOSITION

The postjudgment orders are affirmed.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.